Government's Motion for a Hearing on Issues Concerning the Defendant's Representation if He Is Found Competent

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
(HONORABLE GARLAND E. BURRELL, JR.)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE JOHN KACZYNSKI,
Defendant.
CR-S-96-2S9-GEB

GOVERNMENT'S MOTION FOR A HEARING ON ISSUES CONCERNING THE DEFENDANT'S REPRESENTATION IF HE IS FOUND COMPETENT
Hon. Garland E. Burrell, Jr.

If the Court finds the defendant competent, the Court will again face serious questions concerning the defendant's representation. In particular, the Court will have to decide whether to direct defense counsel to follow their client's instructions concerning the mental defect defense or in the alternative to inform the defendant that defense counsel may put on a mental detect defense in some form during both the guilt and penalty

phases of trial. The government requests that the Court hold a hearing on this matter after receiving Dr. Johnson's report and before the jury is scheduled to return on January 22, 1998. The purpose of this memorandum is to set forth the government's understanding of the Court's options, to sketch the possIble consequences of each choice, and to recommend that the Court instruct defense counsel to follow their client's wishes.

1. ***The Extent of the Disagreement Between the Defendant and Defense Counsel***: In an order dated January 9, 1998, the Court stated that "[t]he gist of the conflict between Kaczynski and his counsel relates to whether a mental status defense should be asserted and communications attendant to that defense." 1/9/98 Order at 6. The Court also found that "[w]hile this conflict presented problems, it has not resulted in a total lack of communication." Notwithstanding these explanations, the government remains in the dark concerning the precise nature and extent of the disagreement between the defendant and his attorneys. The government's understanding is as follows:

a. based on defense counsel's withdrawal of the defendant's Rule 12.2 (b) notice on December 29, 1997, the government infers that defense counsel are willing to abide by defendant's wishes to forego relying on expert testimony in support of a mental defect defense at the guilt phase of trial.

b. Based on counsel's and the Court's statements at the January 7 and 8, 1998, hearings, it seems clear that counsel are not willing to follow the defendant's wish that they forego a mental defect defense at trial.

c. The government has no knowledge of either the defendant's wishes concerning the use of mental detect evidence – expert or otherwise – at the penalty phase or defense counsel's willingness to abide by those wishes.

2. ***Options***

a. ***Authorize Counsel to Rely on a Mental Defect Defense Over the Defendant's Objection***: Based on the events of January 8, 1998, it appears that the defendant will assert his constitutional right to represent himself it the Court rules that defense counsel may put on a mental detect defense of any kind during the quilt phase of trial. If the defendant, after proper warnings from the Court, knowingly and intelligently asserts his *Faretta* rights and is willing to proceed to trial immediately, the government believes that the Court must grant the defendant's request to represent himself. *See United States v. Arlt*, 41 F.3d 516, 518-24 (9th Cir.1994); *see also Adams v. Carroll*, 875 F.2d 1441, 1445-46 (9th Cir. 1989) (defendant's request to proceed without counsel was unequivocal even though it was invoked only as an alternative to appointment of a particular attorney whom defendant did not want). A violation of the right to self-representation always leads to reversal. *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984); *Heckler v. Borg*, 50 F. 3d 1472, 1476 (9th Cir. 1995) . Should the Court grant the defendant's request, it could appoint current or new counsel to a standby role. *See Faretta v. California*, 422 U.S. 806, 835 n.46 (1975); *Savage v. Estelle*, 924 F.2d 1459, 1462 (9th Cir. 1990), *cert. denied*, 501 U.S. 1255 (1991). As the Court recognized during the January 8 hearing, however, the validity of the defendant's de-

cision to represent himself – and a conviction in this case - - may turn on whether the Court correctly concluded that defense counsel has the right to decide whether to put on a mental defect defense. *Compare United States v. Attar* 38 F.3d 727, 734 (4th Cir. 1994) (no error in allowing defense counsel to withdraw immediately before sentencing and thereby requiring the defendant to represent himself), *cert. denied*, 514 U.S 1107 (1995) with *United States v. Scott*, 909 F.2d 488, 49.3 (11th Cir. 1990) (reversible error to force defendant to choose between the right to counsel and the right to testify).

b. ***Direct Counsel to Follow Their Client's Wishes Concerning the Mental Defect Defense***: Defense counsel have suggested that they have an ethical obligation to pursue a mental defect defense over the defendant's objection. *See* 24 Tr. (1/8/98) at 3701. The possibility exists, therefore, that counsel may seek to withdraw if the Court orders them to follow the defendant's wishes. In that case, the Court would have the discretion to deny their request to withdraw. *See United States V. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991) . In addition, the government believes that the Court would have recourse to its civil contempt power to enforce its decision it defense counsel continued to refuse to represent the defendant under those conditions. *See United States v. Accetturo*, 842 F.2d 1408 (3d Cir. 1988). Should the Court hold counsel in contempt, they would have the right to appeal to challenge the Court's conclusion that they must follow the defendant's instructions. *Ibid.*

c. ***Appoint New Counsel***: At the January 7 hearing, the defendant stated that he wishes to be represented by Tony Serra. In its January 9 order, the Court found that substitution of Mr. Serra "would be inappropriate in these circumstances" because the defendant's request for Mr. Serra was untimely and because the defendant's conflict with current counsel was not "so great that it will result in a total lack of communication, thereby preventing an adequate defense." 1/9/98 Order at 5. In addition, the Court noted that "a lengthy continuance could be required just to allow Serra to coordinate his obligations to his many clients." *Id.* at 3-4 n.3.

3. ***The Government's Recommendations***: In *Jones vs. Barnes*, 463 U.S. 745, 751 (1983), the Supreme Court held that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Courts have added to that list the decision whether to rely on an insanity defense. *See United States v. Marble*, 940 F.2d 1543, 1547 (D.C. Cir. 1991); *Alvord v. Wainright*, 725 F.2d 1282, 1288-89 (11th Cir.), *cert. denied*, 469 U.S. 956 (1984); *Foster v. Strickland*, 707 F.2d 1339, 1343 (11th Cir. 1983), *cert. denied*, 466 U.S. 993 (1984). Those decisions are surely correct. Although a defendant in the federal system does not have to plead insanity, *see* Fed. R. Crim. P. 11(a), 12.2(a), the decision whether to rely on an insanity defense usually requires the defendant to admit to committing the actions constituting the charged offense and to waive his Fifth Amendment privilege against self-incrimination. *See Powell v. Texas*, 492 U.S. 680, 685 (1989) (a "defendant waive[s] his Fifth Amendment privilege by raising a mental status defense"); *Hendricks v. Vasquez*, 974 F.2d 1099, 1108 (9th Cir. 1992) (defendant waives Fifth Amendment right by introducing psy-

chiatric testimony in support of a mental defense); *Dean v. Superintendent*, 93 F.3d 58, 61 (2d Cir. 1996) (discussing need to admit offense in order to put on an insanity defense), *cert. denied*, 117 S. Ct. 987 (1997). Because those decisions are closely akin to the decisions whether to plead guilty and to testify, the decision whether to put on an insanity defense is a fundamental one that belongs to the defendant.

1. The ABA Defense Function Standards imp1icitly recognize this difficulty. Standard 4-5.2 states that 'the defendant controls "(i) what pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive a jury trial; (iv) whether to testify in his or her own behalf; and (v) whether to appeal." Under this standard, counsel controls "[s]trategic and tactical decisions," including "what trial motions to be made, and what evidence should be introduced." The standard does not address the difficult question of whether counsel or the defendant controls the choice of defense.

As the Fifth Circuit has stated, however, "categorization of decisions the personal decisions of a criminal defendant or the tactical choices of counsel is not always an easy task." *Autry v. McKaskle*, 727 F.2d 358, 362 (5th Cir.), *cert. denied*, 465 U.S. 1085 (1984). (1)

The government has found no case addressing the question whether counsel may rely on a mental defect defense over the objection of a competent defendant. The government submits that that decision should turn on whether the mental defect defense presented has the attributes of an insanity defense or of other decisions personal to the defendant. *See Brookhart v. Janis*, 384 U.S. 1, 8-10 (1966) (Separate opinion of Harlan, J.) (inquiring whether decision "involved so significant a surrender of the rights normally incident to a trial that it amounted to a plea of guilty or *nolo contendere*" requiring the personal approval of the defendant). Here, the Court has held, the defendant's assertion of a mental defect defense has resulted in a partial waiver of his Fifth Amendment privilege *See* 9/19/97 Order at 5 n.3. It also requires the defendant to acquiesce in a personal characterization that, as with an insanity defense, he may find stigmatizing.

The courts have held, moreover, that defense counsel do not provide ineffective assistance of counsel if they follow their client's wishes, even if the defendant's chosen course of action results in the imposition of the death penalty. *See Langford v. Day* 110 F.3d 1380, 1386-88 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 208 (1997); *Jeffries v. Blodgett*, 5 F.3d 1180, 1197 (9th Cir 1993) , *cert. denied*, 510 U.S. 1191 (1994); Mulligan v. Kemp, 771 F.2d 1436, 1442 (5th Cir. 1985) , *cert. denied*, 480 U.S. 911 (1987); Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987); *see also Dean v. Superintendent*, 93 F.3d at 61 ("It is clearly preferable for counsel to leave the decision whether to reject a legal defense to a client."); *Lowenfield v. Phelps*, 817 F.2d 285, 292 (5th Cir. 1987) ("The circumstances are extremely rare when counsel is not required to follow his client's instructions on a decision of this nature."), *aff'd*, 484 U.S. 231 (1988).

Against this background, the government believes that the most appropriate and safest course is for the Court to direct defense counsel to follow the defendant's wishes

concerning the mental defect defense and use of mental detect evidence at sentencing. Under *Jeffries*, defense counsel will not be providing ineffective assistance of counsel if the defendant makes a competent decision to forego a defense and counsel follow that decision.

2. The Model Rules of Professional Conduct likewise appear to prohibit counsel from withdrawing in this case if the Court orders counsel to continue. Model Rule l.16(c) expressly states that "[w]hen ordered to do 30 by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, even if counsel are correct that they may determine whether to put on a menta1 defect defense or introduce mental defect evidence at sentencing (which the government does not concede), they would be acting unethically in withdrawing in violation of a court order. *See* also Model Code of Professional Responsibility EC 7-8 (an attorney "should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client") . Relying on this ethical consideration, a treatise on criminal defense ethics concludes, "decisions to forego 'legally available objectives and methods' (e.g., *a particular defense*) are . . . the client's to make, not the attorney's." John M. Burkoff, *Criminal Defense Ethics*, Sect. 6.3(a) (1) at (1) (Rev. ed. 1996) (emphasis added).

Moreover, contrary to defense counsel's suggestion, counsel may not terminate their representation of the defendant because he insists on a particular course of action. As applicable here, the California Rules of Professional Conduct provide that counsel may decline to "continue employment" only if the objective of the employment is to "present a claim or defense in litigation that is not warranted under existing law unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." Cal. R. Pro. Conduct 3-200, In addition, "a member [of the California bar] may not request permission to withdraw in matters pending before a tribunal" except for reasons not present here. *Id.* at Rule 3-700(C). Thus, the applicable ethical rules appear to require counsel to remain in the case and follow their client's wishes, not to withdraw. (2)

That conclusion finds confirmation in California Supreme Court decisions presenting facts closely analogous to those present here. In *People v. Lang*, 49 Cal. 3d 991, 264 Cal. Rptr. 386, 782 P.2d 627 (1989), the defendant objected to counsel's decision to put on mitigating evidence during a capital penalty hearing, and counsel acceded to his client's wishes. The California Supreme Court found that counsel had not acted ineffectively, but, more importantly, the court found that counsel's ethical obligations required him to follow his client's instructions: "To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with the attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client." *Lang*, 49 Cal. 3d at 1031. In addition, the court noted the problem apparently presented here, that "imposing such a duty could cause some defendants who otherwise would not have done so to exercise their Sixth Amendment right of self-representation . . . resulting

in a significant loss of legal protection." *Id.* (citations omitted). Similarly, in *People v. Kirkpatrick*, 7 Cal. 4th 988, 30 Cal. Rptr. 2d 818, 874 P.2d 248 (1994), *cert. denied*, 514 U.S 1015 (1995), the California Supreme Court held that "counsel need not attempt to obtain and present expert psychiatric testimony in the face of the defendant's refusal to cooperate." *Id.* at 1013; *see also People v. Howard*, 1 Cal 4th 1132, 1181, 5 Cal. Rptr. 2d 266, 824 P.2d 1315 (1992) , *cert. denied*, 506 U.S. 942 (1992). By contrast, counsel have not cited any ethical requirement that would require counsel to withdraw from the case rather than represent the defendant as he chooses. *See Whiteside v. Scurr*, 744. F.2d 1323, 1327 (8th Cir. 1984) ("a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics"), *rev'd on other grounds sub nom.*, *Nix v. Whiteside*, 475 U.S. 157 (1986).

On the other hand, allowing defense counsel to override the defendant's wishes concerning the mental defect defense raises the prospect of two undesirable results. First, and most likely, the defendant will invoke his *Faretta* rights and represent himself. Although the defendant has the right to do so, the government does not believe that the Court should take action that results in a defendant representing himself in a capital case unless there is no other course open to the Court. As noted, moreover, that course injects into the case the potential that the court of appeals will find that the defendant asserted his right to representation only because he was confronted with the impermissible choice of proceeding with counsel who will not obey his instructions or representing himself.

Second, even if the defendant agrees to keep current counsel on counsel's terms, he and his counsel will have a disagreement over an important matter of trial strategy. Although the Court has found that this disagreement "has not resulted in a total lack of communication," 1/9/98 Order at 6, on appeal the defendant could assert the presence of that disagreement as evidence of an irreconcilable conflict. *See United States v. D'Amore*, 56 F.3d 1202, 1206 (9th Cir. 1995); United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979). In addition, if on appeal the court of appeals concluded that the defendant had the right to decide not to put on a mental status defense, then it could find that the defendant agreed to keep his current counsel - - and thus forego his right to represent himself – based on an erroneous understanding of his rights.

3. If the Court is not inclined to compel current counsel to remain in the case, the government will withdraw its objection to the appointment of substitute counsel. The government made that objection before the defendant stated that he wished to represent himself. In light of the defendant's conditional assertion of his *Faretta* rights, the government believes that it would be preferable to have substitute counsel such as Mr. Serra represent him at trial if he is nor permitted to have his current attorneys.

In sum, the government submits that the Court should direct current defense counsel to continue to represent the defendant and to abide by the defendant's wishes concerning the mental defect defense. If defense counsel decline to comply, the Court should use its civil contempt authorIty to compel compliance Because of the complex-

ity of these issues, the government requests that the Court hold a hearing as soon as possible after the defendant is found competent. (3)

Respectfully submitted,

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By: (signature)
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CERTIFICATE OF SERVICE

The undersigned hereby certities that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on January 15, 1998, she served a copy of the **GOVERNMENT'S NOTION FOR A HEARING ON ISSUES CONCERNING THE DEFENDANT'S REPRESENTATION IF HE IS FOUND COMPETENT** by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Sacramento, California, by depositing said envelope and contents in the inter-office mailbox at the Clerk's Office, Federal Building, Sacramento, California.

Addressee(s):

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